

July 31, 1974

MEMORANDUM TO: Fisher Howe
FROM: Alan Rudlin *AR*
SUBJECT: Revised Approach to Confidentiality
Supplementary Study

*Rudlin
drafting*

Pursuant to our discussion in early July on my initial memorandum, I have modified and clarified some of the categories in line with some of your suggestions. The numbers noted parenthetically by each category refer to the attached bibliography paper on secrecy and classification which I prepared for you in June. This should give us some idea of the work which has been done in the area, and how much purely original research will have to be done. My impression is that the following areas will require further research and study:

1. Section A3: Intended and Actual Operation of the System -- we will probably need field research on the question of how the actual practice proceeds, and, along the lines of a Bayless Manning approach, what some examples of inappropriate classification procedures taken are.
2. Section A5: Comparative Classification Models -- there is only sparse reporting of other countries' approach to this area. Some selective visits to representative countries would provide original research and be properly within the mandate of this Commission.
3. Section A6: A study of the System's Presumptive Exemption of Intelligence Information -- this will be the most demanding area of inquiry, both because of the virtually total lack of any prior research and because of the complexity and sensitivity of the subject matter. This area may be one for cooperative joint action with the Intelligence Study.

The remaining areas in the Confidentiality Supplementary Study have been relatively well analyzed and written upon, and we can synthesize the result of those previous efforts without having to undertake any major research of our own. I think that we should now begin the study by meeting with selected persons knowledgeable in the area, as you suggested early on, and which I recommended as Stage I of the study in my memo of June 21. The meeting should be informal, hold here in our offices, with no more than 6 or 8 persons. We should, however, begin moving on this immediately if you are satisfied with what we have to present to the persons who will be invited to the meeting.

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Confidentiality Supplementary Study

A. The Security Classification System

1. What is the historical origin and legal basis for the present classification procedures including any references to constitutional provisions? Does the system of Executive Orders exist pursuant to delegated authority from Congress, or is there an independent base of authority for the Executive Classification System. (67,10,30)

2. Purposes which the System is Designed to Serve

What is the purpose, as a matter of philosophical consideration and political theory, of the classification system in a democratic society? What are the interests served and the interests damaged by control of information? (46,48)

3. Intended and Actual Operation of the System

How do the statutes contemplate that the system should work, according to legislative intent, congressional discussions, and executive pronouncements? How does the actual practice of the system vary from the theoretical model? How are security clearances awarded and what are the current reasons for denials? Who determines the relevant criteria for awarding such clearances? What is the nature and basis of Special Access Clearances (call word systems)? (17,50,58,23,45,61,75)

4. Past and Current Recommendations for Reform

What were the previous proposals for modifying the Classification System, including official studies as well as ad hoc suggestions? What were the results of those efforts? What are the current assessments and recommendations for

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reform, and how would they modify the theoretical and actual operation of the system? (3,8,52,59 63,73)

5. Comparative Classification Models: The Experience in other Countries and Possible Alternative Approaches

What are the designs for control of information in other countries, both where there are classification systems and where there are not? What has been the experience within those respective countries? What are alternative theoretical models for control of information? (42,83)

6. A Study of the System's Presumptive Exemption of Intelligence Information

What is the interface between the Classification System and intelligence gathered by official agencies, most of which is regularly exempted from procedures for declassification from the operation of the official classification system? What is the basis for this segregated approach, and how does it work?

B. Congressional Access to Information

1. The Classification System as a Problem in Congressional Participation in Foreign Policy

How does the classification system affect access in information for Members of Congress, both in their official and individual capacities? Does the system's control of information deprive members and their staff of a fully informed participation in U.S. foreign policy? What are the constitutional ramifications of the system's effect? (4,5,18,19,20,24,34,37)

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2. The Relationship of the Classification System and Executive Privilege in Withholding Information from Congress (6,7,8)

Where information is denied to Congress, what is the distinction between the invocation of a restricted classification and the invocation of Executive Privilege? What are the other bases, if any, for withholding information from Congress, if neither classification nor privilege? (9,10,79)

3. Secrecy in the Name of National Security: Toward a Workable Definition

What is the definition of "national security," and may information be classified only by dint of that label? What are the constitutional aspects of "secrecy" and "national security"? (40,54,77)

C. Public Access to Information

1. The Uses and Misuses of the Freedom of Information Act

What is the background, intended purpose, actual operation, and defects of the Freedom of Information Act? What are the past and current recommendations for reform, including the bills pending in Congress? (30,80,81)

2. The Public Right to Know: Existence of a First Amendment Right of Access to Facts and Competing Ideas in the Foreign Policy Area (36,44)

What is the constitutional balance between national security and civil liberties? Is there a public "right" to know, as privileged under the First Amendment? What is the protection given to the media (as a servant of the public) in producing leaked information? (25,38,41,47,51,52,56,60,68,76,87,91)

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3. The Relevance of the Espionage Statutes

How do the Espionage Laws affect the dissemination of information given the public? Is there need for a new statute, perhaps akin to the British Official Secrets Act? (13,14,15)

4. The Role of the Judiciary as Arbiters of Access

What has been the role of the Judiciary in mediating disputes for information between official government agencies and members of the public, as well as any official congressional committees. What are the constitutional restraints on a judicial role? (74)